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United Nations Commission on International Trade Law

Forty-third session

Summary record of the 901st meeting*

Held at Headquarters, New York, on Monday, 21 June 2010, at 10.30 a.m.

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)
Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

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* No summary record was prepared for the 900th meeting.

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The meeting was called to order at 11.15 a.m.

Opening of the session

1. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, The Legal Counsel) said that much of the work of the United Nations system rarely made headlines; yet that quiet work was an integral part of its objectives to promote higher standards of living, social progress and economic development. The Charter of the United Nations offered a framework of values that contributed to the emergence of a fair and inclusive global economy, and the Organization established global norms and standards to further develop those values. That standard-setting work had become ever more important in an era of globalization. For more than 40 years, the Commission's work had contributed to forming the basis for the orderly functioning of an open economy, thus helping developing countries in particular to share the benefits of the global marketplace.

2. One of the main items on the agenda for the forty-third session was the finalization and adoption of a revised version of the UNCITRAL Arbitration Rules to take account of developments in arbitration practice since the adoption of the Rules in 1976. The revisions were aimed at enhancing the efficiency of arbitration, and the Rules would certainly continue to contribute to the development of harmonious international economic relations.

3. The Commission would also be considering a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property. In line with the overall objective of the Guide, the draft supplement was intended to make credit more easily available to intellectual property owners and other intellectual property rights holders, thus enhancing the value of intellectual property rights without interfering with fundamental policies of law relating to intellectual property.

4. Since 2006, and particularly in the wake of the global financial crisis, there had been increasing interest in the development of mechanisms to better handle the insolvency of large multinational enterprise groups. The Commission would have before it a draft text — intended to become part three of the UNCITRAL Legislative Guide on Insolvency Law — which, once finalized and adopted, would provide timely guidance in that regard.

5. The Commission was engaged in the revision of its 1994 Model Law on Procurement of Goods, Construction and Services and the consideration of its possible future work in the areas of electronic commerce, security interests and insolvency law. It would also have before it a paper on microfinance in the context of international economic development and possible further action in that field. In addition, it would be considering the challenges associated with facilitating online dispute resolution in cross-border electronic commerce transactions, a subject which continued to gain significance with the rapid expansion of international electronic commerce.

6. In addition to assisting the Commission with the fulfilment of its legislative mandate, the International Trade Law Division was working to promote UNCITRAL legal texts and ways of ensuring their uniform interpretation and application, in particular through technical assistance and cooperation activities, the system of collection and dissemination of case law on UNCITRAL texts (CLOUT) and digests of case law. Case law collected through the CLOUT network facilitated cross-fertilization among jurisdictions, increasing certainty and predictability in commercial law, while the forthcoming digests would identify trends in the interpretation of a given convention or model law. Both sources would benefit judges, arbitrators and others in their everyday work. The Division also assisted the Commission with the coordination of activities with relevant international organizations, the review of its working methods, and monitoring of the implementation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

7. The Commission contributed to the broader work of the United Nations aimed at strengthening the rule of law, since effective commercial law helped to address the root causes of many international problems, such as migration and inequitable access to shared resources. The Commission had discussed its role in promoting the rule of law at its forty-first and forty-second sessions and had included comments on the issue in its subsequent reports to the General Assembly. At the current session, the Commission would be holding a panel discussion on laws and practices of Member States in implementing international law, which had been chosen as a sub-topic for the debate on the rule of law at the sixty-fifth

session of the General Assembly and would no doubt be of benefit to the Assembly's deliberations.

8. The Commission might also wish to address the rule of law and transitional justice in conflict and post-conflict situations, a topic that was equally of interest to the Assembly. The fields of arbitration and conciliation and public procurement, and possible future work in the area of microfinance, seemed particularly relevant in that regard.

Election of officers

9. **The Temporary Chairperson** said that the delegation of Costa Rica, on behalf of the Group of Latin American and Caribbean States, had nominated Mr. Ricardo Sandoval (Chile) for the office of Chairperson of the forty-third session of the Commission.

10. *Mr. Sandoval (Chile) was elected Chairperson by acclamation.*

11. **The Temporary Chairperson** said that the Chairperson would not be present until the third week of the session. Noting that the Commission was meeting as a Committee of the Whole for the consideration of agenda item 4, he invited members to elect a Chairperson of the Committee.

12. **Ms. Peer** (Austria) nominated Mr. Michael Schneider (Switzerland) for the office of Chairperson of the Committee of the Whole.

13. *Mr. Schneider (Switzerland) was elected Chairperson of the Committee of the Whole by acclamation.*

Adoption of the agenda (A/CN.9/683)

14. *The agenda was adopted.*

15. *Mr. Schneider (Switzerland) took the Chair.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Draft article 1. Scope of application

16. **The Chairperson** drew attention to documents A/CN.9/703 and Add.1, which contained the draft revised UNCITRAL Arbitration Rules prepared by the Working Group, and A/CN.9/704 and Add.1-10, which contained a compilation of comments by Governments and international organizations. He proposed that the Commission should consider the draft revised Rules article by article, leaving aside until a later stage article 2, paragraph 2, article 6, paragraph 3, article 34, paragraph 2, and article 41, paragraphs 3 and 4, since work had continued on those provisions after the end of the Working Group's last session and they would therefore require more thorough discussion.

17. He invited the Committee to begin its consideration of draft article 1. Once the full text of the Rules had been adopted, the items in square brackets in article 1 would be completed and the recommended model statements of independence would be discussed.

18. *Article 1 was adopted.*

Draft article 3. Notice of arbitration

19. **The Chairperson** invited the Committee to consider draft article 3. He noted that the Government of El Salvador had proposed that the word "relief" in paragraph 3 (f) should be replaced by the word "measure". A proposal had also been made to add "whether or not there is a response to the notice" to the conclusions in paragraph 5. Since there was no support in the Committee for either proposal, he took it that the Committee wished to adopt article 3 as it stood.

20. *Draft article 3 was adopted.*

Draft article 4. Response to the notice of arbitration

21. **The Chairperson** invited the Committee to begin its consideration of article 4, which constituted a major change to the Rules.

22. **Mr. Vaagt** (Office of Legal Affairs) said that it would be difficult for the United Nations to meet the strict 30-day deadline set out in paragraph 1 (b), owing to the fact that arbitrations were usually handled by outside counsel whose hiring took time under the United Nations rules on procurement. The matter could possibly be dealt with in the United Nations arbitration rules.

23. **Mr. Torterola** (Argentina) said that the 30-day deadline for the submission of documents under paragraph 1 (b) might also be onerous for States or other respondents, in the event of complex arbitration.

It might therefore be advisable to provide for a longer time limit.

24. **The Chairperson** pointed out that the observation had been made to the Working Group that the deadline provided for in the article under consideration and in other parts of the Rules were too lengthy and gave rise to complaints in arbitration. Before changing the time limit, the Committee must consider whether that might affect the acceptability of the Rules. The problem might be dealt with in the arbitration clause. In addition, an observation could be recorded that States might have difficulty in organizing their defence, obtaining counsel and preparing a response. He pointed out, however, that there was a difference between establishing the arbitration tribunal and preparing the defence. Under the current rules, the respondent might have a longer time to develop a defence; the time limit pertained solely to designating an arbitrator.

25. **Mr. Abascal Zamora** (Mexico) said that his Government opposed the inclusion of the article on the grounds that it would give rise to difficulties in arbitration and was not within the Committee's mandate. He therefore proposed that it should be deleted.

26. **Mr. Seweha** (Egypt) wondered whether a delay would have any consequences and, if so, whether it might be preferable to refer to such consequences in article 4.

27. **The Chairperson** replied that one consequence was set out in paragraph 3, which stated that "constitution of the arbitral tribunal shall not be hindered by any controversy", in which event the appointment of arbitrators and establishment of the tribunal would proceed under article 8. The claimant could then decide whether to proceed to a substitute appointment under the Rules.

28. **Mr. Torterola** (Argentina) said that an annotation in the Rules stating that some States and other respondents might find it difficult to comply with the 30-day time limit would suffice.

29. **Mr. Jacquet** (France) said that the Working Group, mindful of the difficulties that might arise under article 4, had made provision both for obligatory items, set out in paragraph 1, and for optional items, set out in paragraph 2, to be communicated within the 30-day deadline.

30. **The Chairperson** said that he took it the Committee agreed to the proposal by El Salvador that the words "to be" should be added before "constituted" in paragraph 2 (a). He suggested that the Committee should further consider the questions of the 30-day time limit and the identification of those items whose communication within that limit might be problematic.

31. *It was so decided.*

Draft article 5. Representation and assistance

32. **Mr. Nikolaichik** (Belarus) drew attention to his Government's proposal, contained in document A/CN.9/704/Add.2, that a phrase should be added to the second sentence of article 5 relating to the certification of credentials.

33. **The Chairperson** said that he saw no support for the proposal in the Committee.

34. *Draft article 5 was adopted.*

Draft article 6. Designating and appointing authorities

35. **Ms. Hu** Shengtao (China) said that her Government, in its comments contained in document A/CN.9/704/Add.1, had suggested that the reference to the Permanent Court of Arbitration (PCA) in paragraph 1 should be deleted, as that article had not been thoroughly discussed by the Working Group.

36. **Ms. Peer** (Austria) said that her Government supported China's suggestion that the PCA should be solely a designating authority and not an appointing authority.

37. **The Chairperson** said that the reference to the PCA had been added as a clarification to indicate that it was not necessarily limited to the position of designating authority but could also act as an appointing authority, since at present it did act in the latter capacity. Austria was now proposing that the PCA should act as a designating authority but not as an appointing authority. He asked whether the Committee concurred.

38. **Mr. Petrochilos** (Greece) said that the PCA, in a previous submission to the Working Group, had pointed out that there was a practice of having it act as both designating authority and appointing authority. The purpose of the reference to the PCA in paragraph 1 was to codify existing practice. Any change to the

provision might affect the validity of a number of long-standing agreements.

39. **The Chairperson** said that he took it that, in the absence of any support for the proposal by China and Austria, the Committee wished to adopt draft article 6 in its current form.

40. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that draft article 6, paragraph 4, should include a specific reference to refusal by an appointing official to act in the context of a challenge.

41. **The Chairperson** said he thought that refusal to act in the context of a challenge was covered by the first phrase of the first sentence of the paragraph, which referred to the appointing authority's refusal to act.

42. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that that phrase could be said to apply to failure to make a decision with respect to fees and expenses as well. For the sake of completeness, therefore, specific reference should be made to failure to act in respect of challenges.

43. **The Chairperson** said that a specific reference to challenges was not necessary and suggested that paragraph 4 could be considered in the context of draft article 41.

44. **Mr. Vaagt** (Office of Legal Affairs) said that the strict stipulation in draft article 6, paragraph 2, that the parties had to agree on the choice of an appointing authority within 30 days was difficult to implement. That difficulty should be reflected in the final report and maybe in the resolution on the application of the strict time limits imposed by the new UNCITRAL Arbitration Rules.

45. **The Chairperson** said that he found nothing wrong with that difficulty being mentioned in the final report, but its inclusion in the resolution could only be considered during the discussion on the resolution itself.

46. **Mr. Jacquet** (France) said that since the decision had been made to include the time limit in the text, there was no point in indicating that the time limit was impractical or difficult to implement. It was important not to introduce elements into the report that would contradict the Rules themselves. Much like paragraph 3 of draft article 6, paragraph 4 of that article should also be considered at a later stage in connection with draft article 41.

47. **The Chairperson** said that he had already indicated that draft article 6, paragraph 4, would be deferred and revisited in the context of draft article 41.

48. **Mr. Castello** (United States of America) said that failure to act in the context of a challenge was not covered by draft article 6, paragraph 4, because it referred to an activity that had no time limit, whereas paragraph 4 referred to failure to act under the 30-day deadline or failure to act within any other period provided by the Rules.

49. **The Chairperson** said that the issue could be resolved either by redrafting the text to avoid enumeration of different situations where the appointing authority might be called upon to intervene, or by adding the reference to failure to act in the context of a challenge. He suggested that paragraphs 3 and 4 of draft article 6 should be considered at a later stage.

50. *Draft article 6, save for paragraphs 3 and 4, was adopted.*

Draft article 7. Number of arbitrators

51. **Mr. Abascal Zamora** (Mexico) said that his delegation had already proposed an alternative text to draft article 7 and wished to consult with other delegations to discuss its proposal.

52. **The Chairperson** said that the text was available in Spanish only and could not be discussed in detail until it was available in all the other languages. In the meantime, only the substance of the proposal could be discussed. He sought clarification as to whether the proposal affected the fall-back position of one or three arbitrators for arbitral tribunals.

53. **Mr. Abascal Zamora** (Mexico) observed that when the 1976 Rules were drawn up the number and complexity of international arbitration cases justified the appointment of three arbitrators. However, circumstances had changed considerably, with the increasing speed and number of transactions in the current international business environment. There were now many cases where one arbitrator was preferable to three. For example, in certain instances, the amount of money at stake was so insignificant that it made no sense to appoint three arbitrators. The gist of the Mexican proposal was that a default rule of a sole

arbitrator should be established, with the possibility of three arbitrators being appointed for specific cases. Following that appointment, the sole arbitrator would hear the parties, examine the documents, and then decide whether it was justified to have a three-person panel or to proceed alone.

54. **The Chairperson** noted that the mechanism to be used in the absence of a specific choice by the parties had been discussed at length and that the solution of three arbitrators which had been adopted by the Working Group had been criticized for the same reasons as those raised by the Mexican delegation. It was therefore necessary for the Committee of the Whole to discuss the matter, but that discussion should be deferred until the text was translated and submitted to the Committee.

55. **Mr. Abascal Zamora** (Mexico) said that experience had shown that where the parties did not agree on the number of arbitrators, more and more appointing authorities were adopting the sole arbitrator option.

56. **The Chairperson** said that the idea of having the final decision made by a sole arbitrator who had full knowledge of the case was somewhat attractive, especially if the appointing authority was not well equipped to conduct a thorough analysis before deciding on the number of arbitrators. He suggested that draft article 7 should be considered at a later stage, pending a review of the Mexican proposal.

57. *It was so decided.*

Draft article 8. Appointment of arbitrators

58. *Draft article 8 was adopted.*

Draft article 9

59. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage), referring members to the Comité's written comments (A/CN.9/704/Add.5), said that draft article 9 did not provide for arbitrators to consult with the parties before appointing the president of the arbitral tribunal. The draft article could be amended to read as follows: "If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall, after consultation with the parties should they so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal."

60. **The Chairperson** said that he had understood the assumption behind the proposal to be that the current text could preclude consultation between the arbitrators and the parties.

61. **Mr. Petrochilos** (Greece) said that the proposal was not meant to indicate that consultation was mandatory, but that it should be allowed.

62. **The Chairperson** asked whether, with the proposed amendment, it was the parties or the arbitrators who decided.

63. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that Greece's interpretation was correct. The idea was not to impose consultation but to remove any uncertainty as to the possibility of the appointed arbitrators consulting with the parties before choosing the president of the arbitral tribunal.

64. **The Chairperson** said he took it that the Committee wished to defer consideration of the new phrase, "after consultation with the parties should they so decide", as well as the proposal by Slovenia (A/CN.9/704) that the reference in the last sentence of draft article 9, paragraph 3, should be to article 8 as a whole and not only to article 8, paragraph 2.

65. *It was so decided.*

The meeting rose at 1.05 p.m.